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IN THE

SUPREME COURT OF THE UNITED STATES

Octotober Term, 1971

No. 71 - 704

DONALD SCHANBARGER,

Petitioner,

V

ROBERT KELLOGG, PETER COOPER,
(Inactive)

DAVID GARVEY and FREDRIC MORGENSTERN
Respondants.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION OF THE THIRD JUDICAL DEPAPTMENT

DONALD SCHANBARGER
Salem, New York 12865

Petitioner

November 22, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.____

DONALD SCHANBARGER, Appellant,

V

ROBERT KELLOGG, PETER COOPER,
(Inactive)

DAVID GARVEY AND FREDRIC MORGENSTERN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION OF THE THIRD JUDICAL DEPARTMENT

The petitioner Donald Schanbarger respectfully prays that a writ of certiorari issue to review the the judgment and opinion of the New York State Third Appellate Division of the Supreme Court 18, 1970.

OPINION BELOW

Opinions of the New York State Third Appellate Division of the Supreme Court and Supreme Court for Rensslaer County, appear in the Appendex hereto.

JURISDICTION

The judgment of the New York State Third Appellant Division of the Supreme Court was entered on December 18, 1970. A timely appeal to the New York State Court of Appeals was dismissed as raising insufficent constitutional question. on July 7, 1971. A timely request to the New York State Court of Appeals, for leave to appeal to the New York State Court of Appeals too exhaust any New York State remedy the Petitioner may had against raspondents David Garvey and Fredric Morgenstern, was denied on October 6, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

It is expected that the respondents will object to petitioners method for raising federal issues. Such issues presumably were automatically raised and consididered by the New York State courts undcr New York STate Civil Practice Laws and Rules, Rule 4511 (a), "every court shall take judicial notice without request of the --- constitution --- of the United States ---" and Section 2001, "at any stage of an action, --- if a substantial right of a party is not prejudiced. the mistake, omission, defect or irregularity shall be disregareded". In light of CPLR 4511 (a) and Section 2001, there may not be need of raising federal questition (magic words) for this Court jurisdiction unber the princibles of Saltonstall v Saltonstall, 276 US 260, 267-

8; Edwards v Elliott, 21 Wall. 523, 549-51; Charleston Fedral Savings and Loan Ass'n v Alderson, 324 US 182, 185-6; since all New York civil courts presumably by duty are obliged, and do consider the United States Constitutional questions even if not raised in any maner.

The petitioner was suprised that the Decision of the Third, Department Appeliate Division of the Supreme Court of New York, seem to show open suport that a court appointed psychiatrist is responsible to a prosecutor, which is opposite to In re Harmon, US Court of Appeals for the 1st Circnit, 38 LW 2619, May 6, 1970. (cited in 'mental health digest' Vol. 2 No. 12, Dec. 1970. page 55) and that district attorney's of New York State have a fuction to investigate crime thru a court appointed psychiatric examination.

Printed Brief for the New York State Court of Appeals R.79-124 (pointedly p. 2 and 36-7 being R. 82 & 119-120) made a part of the record by reference, on petitioners affidavit in opposition to Dismiss Appeal, to the N.Y.S. Court of Appeals R. 57 and thru affidavit for leave to appeal on the merits to the N. Y. S. Courts of Appeals (R. 64) clearly and specifically raised United States Constitutional question. Should one feel the petitioner should had been more extensive on federal framed questions to the New York State Court of Appeals, please note that under New York State Civil Practice Law and Rules, Rule 5528 (a) 2 ("the brief of the appellant shall contain ---

not exceeding two pages, of the questions involved") and that two pages of framed question were used.

Paragragraph 37 of the complaint (R.23-4) raises the issues that psychiatric examination for investigation into crime violates a persons right to remain silent under the United States Contitution. Paragraph 15 (R. 16) raised the issue that petitioner " was arrested on mere suspicion without probable cause, which the United States Supreme Court to date has always held illegal." The affidavit of Donald Schanbarger, to the New York Supreme Court, raised the issue of violation of Maranda v Arizona, 384 US (R. 35) as did Argument (Brief) point 7, p. 9 (R. 92), for appellate courts of N. Y. S.

Question No. 8, presented to the New York State Court of Appeals, the issue "are members of a district attorney's staff immune from civil liability, should non-legal, and or prohibited under the Constitution of the United States". (Brief p. 2., R. 85). Question No. 11, q. 2(R. 85) and Brief argument p. 36-7 (R. 119-120 presented to the New York State Court of Appeals; the question if the "Decision of the Appellate Division of New York Supreme Court (R. 48-9) constituted prohibited state action under the United States Constitution (such as Amendements 4, 5, 6, 9, 10 and 14 Section 1.)", and p. 36-7 (R. 119-120) stating specific clauses. Brief argument p. 22 (R.105) raised the issues that the petitioner was denied rights under United States

Constitution Amendment 4, 5, 10 and 14.

The petitioner before all courts showed the notion that the respondents conduct was prohibited and the petitioners was protected under the United States Constitution. It is a vain thing to image a right without a remedy; for want of a right and want of remedy are reciprocal, 1703 Holt, C.J. Ashby v White 2 Ld,Raym 938,953. (Brief p. 35, R. 118) It would seem for all practial use the New York State Court of Appeals reviewed this case and decided not to hear it.

Standing to raise the feberal question is dependent general upon state law, provided the state rules are subject to the United State Supreme Courts judgment. (see Cramp v Board of Public Instruction, 363 US 278) The jurisdiction of the United State Supreme Court to re-examine the final judgment of a State court can not arise from mere inference, but only from averments so distint and positive as to place it beyond question that the party bring a case to the Supreme Court from such a court intended to assert a Federal right. (Oxley Stave Co. v Butler County, 166 US 648, 665) If the United States Supreme Court is convinced that the federal question was necessarily decided (see Street v NY, 394 US 576) or mere evasion, the United States Supreme Court has jurisdiction (see Rogers v Alabama, 192 US 226, 230-231).

QUESTIONS PRESENTED

1. Are members of a district attorney's staff immune from civil liability should they become involved in activites that are non-legal, and or that are prohibited under the Constitution of the United States, and the laws enacted under them?

2. Is it a duty or fuction of a district attorney's office, to conduct a psychiatric examination on referral from the court, when such referral was made on motion of the district attorney's office?

3. Does a district attprney have the duty or fuction to present a case to a court without preperation, frankness and cander?

4. Does the Decision of the Appellate Division of the New York State Supreme Court (R. 48-9) constitute prohibited state action under the United States Constitution (such as Amendments 4, 5, 6, 9, 10 and 14 Sec. I).

U.S. CONSTITUTIONAL PPOVISIONS INVOLVED

14th Amendment, Section 1. Exemption from enforcement of laws which abridge the privileges or immunities of U.S. citizen, exemption from being deprived of liberty or property without due process and equal qrotection clauses.

Thru 14 Amendment;
4th Amendment, right to be secure

against unreasonable searches and seizures clause.

5th Amendment right to be exempt to answer for a capital or other wise infamous crime for which an indictment of Grand Jury is required, exemption from being compelled to be a witness against ones self and exemption from being being required of liberity and property without due process of law clauses.

6th Amendment denial of right to a speedy trial and to be informed of the nature and cause of accusation claueses,

10th Amendent powers prohibited to the State are reserved to the people clause.

STATEMENTMENT OF THE CASE

A disqute begain on April 30, 1968, when petitioner was walking along a road and was arrested by New York State Troopers, for failure to supply positive idenification, origan of departure and destination, and charged with loitering (NYS Penal Law Sec. 240.35 (6). Petitioners first trial date was delayed two weeks at the motion of Assistant District Attorney respondent, David Garvey, presumadly to obtain a psychiatric examination into criminal matters of petitioner. By direction of a court, petitioner was given an psychiatric examination by psychiatrist, respondent Fredric Morgenstern, presumadly into criminal matters. At the second trial date petitioner was found guilty of loitering because he had not told tke New York State Troopers his name and where he was going (People v Schanbarger, 24 NY 2d

288). After appeals the case against petitioner was dismissed and petitioner made suit against respondants for abuse of process, for which New York State courts granted respondents quasi-judical immunity from civil suit. (a. malicious prosecution and b. psychictric examination for crimial information)

REASONS FOR GRANTING WRIT

The Decision Below Raises Significant and Recurring Problem in Holding Members of District Attorneys' Offices Responsible for Unconstitutional Practices that are Common to there Office.

The major thrust of the federal question, is quasi-judicial immunity given the respondents by the New York State courts, denies the petitioner and like person, the only possible remedy against the active respondents and there respective profession, in violation to the prohibited state conduct, due process and equal protection clause of the 14th Amendment Section 1. of the United States Constitution, by the State thru its agents, inforcing a law for interrigation into criminal matter, and by case law making such agents immune to prosecution.

Reversing or qualifing the case law of quasi-judical immunity from civil suit of Yaselli v Goff, 12 F 2d 396, 404, affd. 275 US 503, seems appropriate in light a member of a district attorney's office in practice and effect, for all practical

purpose are exempt from criminal prosecution, for nation wide unconstitutional fuction of a district attorney office, as are involved in this case.

The practice of public prosecutors, knowingly prosecute criminal defendants and protect police officers that make cover charges are common. (see Police Power, by Paul Chevigne, p. 136-160; Professional Responsibility of a Prosecuting Attorney, by Monroe H. Freedman, in Criminal Law Bulletin 3(8) 1967, page 547)

The abuse of psychiatric examintation as evidence gathering (p.76-82) and psychiatrict commitment, in denial of due process and the general schem of things are well pointed out in Psychiatric Justice, by Thomas S. Sazasy.

The administration of criminal and civil justice is and has been in general dispuite for years, as is well pointed out in Justice Denied, by Leonard Downie, Jr.

The enforcement of the Cannons of Professional Ethics Adopted by the N.Y.S. Bar Ass. as other States, are not enforced. Notice #5 where the duty of prosecutors is not to convict, but to see that justice is done, and the suppression of facts of innocence is highly reprehensidle; #22 where the conduct of a lawyer before the court should be characterized by cander and fairness; #29 where a lawyer should improve the law and the administration of justice; and #32 where a

lawyer should not render any service involving disloyalty to the law.

The Decision appealed from seems to give open suport that, a psychiatrist is responsible to the prosecutor, which is opposite to, In re Harmon, US Court of Appeals for the 1st Circuit, 38 LW 2619, May 6, 1970.

The basic reccuring problem that members of the bench and district attorneys in New York State laugh at constitutions (1951 People v Reilly, NYS 2d 845), is also a nation wide problem. The lawlessness or dereliction of duty of the lower courts would seem the major sourse of disrespect of the lower courts. Public prosecutors and members of the lower bench, like every one, find the hardest thing to give is, IN. For example note, Judges as Tyrants, by Herman Schwarty, p. 132 (8) in Criminal Law Bulletin, Vol. 9, No. 2, March 1971, "(8) This is why the judicial revolution on behalf of criminal defendants has been almost entirely a one-court affair- the Supreme Court of the United States. The State courts and the lower federal courts have resisted, evaded and blunted these decisions as much as possible, often expressing an open hostility to the Court and its efforts matched only by that of prosecutor and police. The private remarks about the Supreme Court at judge conventions are not too different from thoes at prosecutors' meeting."

In essence, if constitutional rights

are to be anything more then artificial or futile rights, there must be reasonable remedies against a thief of constitutional rights.

CONCLUSION

For these reasons, a writ of certioari should issue to review the judgment and Decision of the Third Appellate Division of the New York State Supreme Court.

Respectfully submitted,

Donald Schanbarger

DONALD SCHANBARGER
Salem, New York 12865

Petitioner

November 22, 1971

STATE OF NEW YORK
SUPREME COURT RENSSELLAER COUNTY
****

DONALD SCHANBARGER,
Plaintiff,

-against-

ROBERT KELLOGG, PETER COOPER, DAVID GARVEY AND FREDRIC MORGENSTERN,
Defendants.
****

(Supreme Court, Albany County Special Term, June 12, 1970)
(Justicee De Forest C. Pitt, Presiding)

APPARANCES : DONALD SCHANBARGER, PRO SE

EDWARD M. MURRAY, ESQ.,
ATTORNEY FOR GARVEY & MORGENSTERN.
(JAMES B. CAMFIELD, ESQ., of counsel)

MEORANDUM

PITT, J.

This is a motion by Defendants, David Garvey and Fredric Morgenstern, for an order dismissing plaintiff's complaint.

Upon reading the papers submitted upon this motion and a review of the authorities it appears that the moving defendants are to be afforded civil protection to the extent that as quasi judical officers

are immune from civil action arising out of any acts preformed by them in their official capacites.

Accordingly, the motion of dismissal will be granted.

Submit order accordingly.

Dated: Troy, N.Y.

June 24, 1970.

SUPREME COURT--APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

NOVEMBER 30, 1970 15929

DONALD SCHANBARGER, Appellant,
V
ROBERT KELLOGG, et al., Defendants,
and
DAVID GARVEY et al., Respondents.

Appeal from an order of the Supreme Court at Special Term, entered July 2, 1970 in Rensselaer County, which granted a motion to dismiss the complaint as to defendants, David Garvey and Fredric Morgenstern.

In the early morning of April 30, 1968 defendant, Robert Kellogg, State Trooper, arrested appellant in the Town of East Greenbush, County of Rensselaer, and charged him with violation of subdivision 6 of section 240.35 of the Penal Law (loitering). On May 15, 1968 appellant appeared in Justices' Court for trial of

the charge, at which time respondent Garvay. an Assistant District Attorney for Rensselaer County made a motion for a psychiatrict examination of the appellant which motion was granted, and appellant was examined on May 22,1968 by respondent Dr. Fredrick Morgenstern. Thereafter, a trial was held in Justices' Court, and appellant was found guilty and fined $10. Upon appeal, the Court of Appeals held that the information which appellant was tried was insufficient; that the testimony at the trial was also insufficient; and the judgment was reversed, and the information dismissed. (People v Schanbarger, 24 N Y 2d 288.)

Appellant's complaint contains two causes of action against Garvey and Morgenstern alleging malicious prosecution; abuse and perversion of process for psy-

chiatric examination; and invasion of privacy and seeks both compensatory and punative damges. The main issues on this appeal is whether or not respondents are entitled to the defenct of absolute privilege from suit.

Since the causes of action alleged in the complaint are subject to a motion to dismiss for insufficiency the defence of privilege need not be first alleged. (Salomon v Mahoney, 271 App. Div. 478, affd. 297 N.Y.643; Manceri v City of New York, 12 A D 2d 895; Zimmerman v. City New York, 52 Misc 2b.797.)

An Assistant District Attorney is a quasi judicial officer and, as such, he, as well as all persons acting under his direction and control, are immune from civil suit for offical acts performed by them in the ivestigation and prosecution

of the crime with which appellant was charged, even if it be assume they acted maliciously to the injury and damage of appellant.

''The doctrine of immunity based on official privilege is recognized in this State, being based upon 'consideration of public policy and to secure the unembarrassed and efficient adinistration of justice and public affairs'***. The desirability of such a policy is easily recognized as essential in the conduct of official business.'' (Cheatum v Wehle, 5 NY 2d 585, 592-593.)

The case of Manceri v City of New York (supra) held that

''It is also clear that the defendant in the exercise of his official duties as Assistant District Atorney as assistant District Attorney performs

quasi-judical fuctions. See 13 Jur., 179-108; People v Fielding, 158 N.Y. 542,547; Matter of McDonald v. Goldstein, 273 App. Div.649, 651; Yaselli v. Goff, 12 F. 2d 396, 404, affd. 275 U.S. 503; Gregoire v Biddle, 177 F. 2d 579 580, cert denied 339 U.S. 949.). Within such functions are included the acts of such an official in the investigation of criminal charges and interrogation of persons connection therewith.''

Consquently, the functions performed by the Assistant District Attorney are privileged as acts carried out in the course of his employment. So, too, are the acts here performed by the medical examiner in the conduct of his conrt-ordered psychistric examination of appellant. His position, the nature of his

duty, the degree of his reponsibility and the circomstances involved lead to the conclusion that he was acting in a quasi-judical capacity. (Rattkamp v Young, 21 A D 2d 377 376, affd. 15 NY 2d 831; see, Code Crim. Pro., Sec. 661

Order affirmed; without costs.

REYNOLDS, J. P., STALEY, JR., GREENBLOTT, COOKE and SWEENEY, JJ., concur.